

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MARIA VALDIVIA,

Plaintiff,

CIVIL NO. 2000/18

v.

KMART CORPORATION,

Defendant

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TO: Lee J. Rohn, Esq.

Terri L. Griffiths, Esq. - Bryant, Barnes & Simpson

ORDER ON KMART'S MOTION FOR SANCTIONS AND COSTS

THIS MATTER came for consideration on Kmart's Motion for Sanctions and Costs. Plaintiff filed opposition to the motion and Kmart filed a reply to such opposition.

Kmart's motion pursuant to Fed. R. Civ. P. 37 is premised on the non-appearance of Plaintiff and her counsel at deposition noticed for April 20, 2000 at 1:00 P.M. The salient facts are as follows:

1. On March 31, 2000, Kmart's attorney faxed a notice of Plaintiff's deposition to Plaintiff's counsel. A copy was mailed on April 3, 2000. The notice scheduled Plaintiff's deposition on April 20, 2000.
2. Kmart's attorney did not discuss or clear such date with Plaintiff's attorney. The notice was issued unilaterally because Kmart's attorney "learned that

Plaintiff's counsel was available when a deposition in another case scheduled for that date was cancelled."<sup>1</sup>

3. On April 10, 2000, Plaintiff's attorney sent Kmart's attorney a letter indicating that no attorneys were available to take the deposition on April 20, 2000. The letter stated that "...as you are aware, I will also want to schedule Kmart and its witnesses deposition on the same date. I have checked with Mary Faith and she is available to schedule these deposition for the fourth week in May PROVIDED Kmart has responded to the outstanding discovery." (Exhibit "B" to Kmart's motion).
4. On April 11, 2000 Kmart's attorney responded that she would consider re-scheduling Plaintiff's deposition if Plaintiff's attorney provided the names of other cases that caused Plaintiff's counsel to be unavailable on April 20, 2000. (Exhibit "C" to Kmart's motion).
5. Plaintiff took the April 11, 2000 letter "to be so insulting it was not answered." Plaintiff now asserts that the other scheduled depositions were cancelled and

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1. On March 31, 2000, Kmart's attorney sent a letter to Plaintiff's attorney regarding Kmart's attorney's contact with Plaintiff's attorney's office (Plaintiff's exhibit "1").

instead Plaintiff has to substitute a day of depositions in another case due to an upcoming trial (Plaintiff's Exhibits "3" and "4").

6. The parties never agreed to continuance of the April 20, 2000 deposition of Plaintiff and Plaintiff did not move for a protective order. Kmart contends that "...since the Plaintiff did not seek or obtain a protective order we expected that the deposition would proceed as scheduled. On April 20, 2000 at 1:00 P.M., the court reporter, the interpreter, and the undersigned counsel appeared for the Plaintiff's deposition."

Contrariwise, Plaintiff asserts, "Plaintiff's counsel reasonably believed that the unilaterally noticed deposition was cancelled and would be re-scheduled at a mutually agreeable time. Plaintiff's counsel was totally surprised when her office received a call that the depositions were still scheduled and inquiring where Plaintiff's counsel was. Counsel for Defendant was clearly told that all attorneys were not available."

In support of its motion, Kmart cites Fed. R. Civ. P.

30(b)(1) (Notice of Deposition) and that a party seeking to avoid taking such deposition must seek and obtain a protective order before the scheduled deposition date [Rules 26(c) and 37(d)]. Kmart also notes objection to Plaintiff's attorney unilaterally attempting "to dictate the sequence and timing of discovery from the onset of the case."<sup>2</sup> (citing Rule 26(d) regarding **timing and sequence of discovery**). Kmart requests sanctions pursuant to Fed. R. Civ. P. 37(d) [with reference to 37(b)(2)(A)(B)&(C)].

In opposition to the motion, Plaintiff cites LRCi 26.2(b)(1) regarding cooperative discovery arrangements and that because Kmart knew Plaintiff's attorney was unavailable on April 20, 2000, the Rule 30(b)(1) notice was not reasonable.

It is clear that Plaintiff violated Fed. R. Civ. P. 37(d) when neither Plaintiff or her attorney appeared for deposition on April 20, 2000 and where Plaintiff did not seek or obtain a protective order in that regard. *Robert Billet Promotions, Inc. v. Imi Cornelius, Inc.*, 1995 WL 672385 \*2 (E.D. Pa.) The Court is concerned however that such deposition was unilaterally noticed by Kmart's attorney upon **surmising that Plaintiff's attorney was available at such time**. Plaintiff's attorney

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2. This is a reference to the April 10, 2000 letter from Plaintiff's attorney to Kmart's attorney (Kmart's Exhibit "B").

subsequently notified Kmart's attorney that she was not available on that date which beclouded the prospects of a successful deposition yet neither attorney called the other to clarify the situation.<sup>3</sup>

As provided in LRCi 26.2(b)(1), "cooperative discovery arrangements in the interest of reducing delay and expense are encouraged." Unilaterally noticed depositions are inimical to such procedure and lead to situations like the one at hand. See *Seabrook Medical Systems, Inc. v. Baxter Health Care Corp.*, 164 F.R.D. 232, 233 (S.D. Ohio 1995),

...The court therefore finds...as a matter of professional courtesy, and as a means to avoid future scheduling conflicts...that, when making arrangements for third party depositions, counsel for both sides should jointly call the third party deponent to schedule that party's deposition. When such calls cannot be made due to the third party's unavailability, ...counsel for both sides should contact each other and jointly agree to a deposition date. Only then should the deposition subpoena issue. **What needs to occur is quite simple: counsel should discuss and agree to a deposition date before the issuance of the subpoena, not after.** (emphasis added).

See also *In Re: Braniff, Inc.*, Debtor, 1992 WL 261641 \*12 (U.S. BankR., M.D. Fla.) with regard to cooperative scheduling upon consultation.

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3. See *American Health Systems v. Liberty Health System et al.*, 1991 WL 4405 \*4 (E.D. Pa.) "...fault of course is a broad and amorphous concept."

Kmart is correct in its assertion that Rule 26(d) provides for no rule of priority in discovery and that the fact that one party is conducting discovery does not delay any other party's discovery. This does not, however, obviate the need to confer and seek accord in this regard. If, in the opinion of either party the other is unduly obstinate or uncooperative<sup>4</sup>, the complainant should seek court assistance as provided in Rule 26(d).

Accordingly, upon consideration of the above, it is hereby;

**ORDERED** as follows:

1. Kmart's Motion for Sanctions and Costs is GRANTED in part.
2. The parties shall cooperate in scheduling Plaintiff's deposition by June 15, 2000. The parties shall also confer and agree to later dates for depositions of Kmart and its witnesses.
3. Within ten (10) days of the date of this Order, Plaintiff shall pay to Kmart the sum Two Hundred Twenty-Eight Dollars (\$228.00) as and for costs incurred due to Plaintiff's non-appearance at the deposition.<sup>5</sup>

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4. This would include an insufficient number of attorneys available for taking depositions in a reasonably prompt manner.

5. Per affidavit of Kmart's attorney (Exhibit "D" to reply): court reporter - \$58.00 and interpreter \$170.00. Total \$228.00.

**Valdivia v. Kmart**  
**Civil No. 2000/18**  
**Page 7 dated May 30, 2000**

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4. Kmart's motion is otherwise DENIED.

ENTER:

Dated: June 13, 2000

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JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

ATTEST:  
ORINN ARNOLD  
Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk